SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

Supreme Court of the United States

October Term, 1973
No. 73-327

STATE OF OHIO, *ex rel.* RONNIE WOODBURY and THOMAS WOODBURY,
Petitioners,

v.

DANIEL T. SPITLER, Prosecuting Attorney of Wood County, Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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STATEMENT

The petitioners, Thomas Woodbury and Ronnie Woodbury, pray that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Ohio, rendered on June 14, 1973, which unanimously affirmed the order of the Court of Appeals of Wood County, Ohio dismissing petitioners' petition for writ of mandamus requiring the respondent to dismiss certain criminal indictments pending against the petitioners in the Common Pleas Court of Wood County, Ohio, pursuant to a plea bargain agreement entered into by the petitioners and respondent.

OPINION BELOW

No opinion was rendered by the Court of Appeals of Wood County, Ohio in dismissing the petitioners' petition for writ of mandamus. A copy of the decision and order of that Court is annexed hereto and marked Exhibit A.

A copy of the opinion of the Supreme Court of the State of Ohio, affirming the order of dismissal of the petitioners' petition for writ of mandamus by the Court of Appeals of Wood County, Ohio, is annexed hereto and marked Exhibit B. A copy of the order of that Court issued upon its opinion is annexed hereto and marked Exhibit C. A copy of the order of that Court denying petitioners' motion for rehearing is annexed hereto and marked Exhibit D. A copy of the mandate of that Court issued upon its opinion and order is annexed hereto and marked Exhibit E.

JURISDICTION

The order or judgment of affirmance, the order or judgment of denial of rehearing and the mandate of the Supreme Court of the State of Ohio, were all entered on June 14, 1973. This petition for certiorari was filed within 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioners, Thomas Woodbury and Ronnie Woodbury were denied due process of law under the Fifth and Fourteenth Amendments of the United States

Constitution and the Tenth and Sixteenth Sections of Article I of the Ohio Constitution when they were fraudulently induced to plead guilty, give sworn statements and submit to polygraph tests upon the promises of Judge Floyd A. Coller and/or the respondent, (Prosecutor) Daniel T. Spitler, that there would be no further proceedings in the remaining criminal indictments pending against the petitioners, when such indictments have not been dismissed, but have repeatedly been set for trial, only to be stayed by the appeal actions of the petitioners?

2. Whether the order and mandate of the Supreme Court of the State of Ohio, affirming the decision of the Court of Appeals of Wood County, Ohio, to dismiss the petitioners' petition for writ of mandamus requiring the respondent to dismiss the remaining criminal indictments pending against the petitioners is consistent with the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution and the Tenth and Sixteenth Section of Article I of the Ohio Constitution?

3. Whether the judge, Honorable Floyd A. Coller, and the prosecutor (respondent Daniel T. Spitler), are required to perform the promises which they made to the petitioners as part of a plea bargain and upon which the petitioners relied in pleading guilty, giving sworn statements and submitting to polygraph tests, all of which has acted to the jeopardy of the petitioners? (*Santobello v. New York*, 404 U.S. 257.)

4. Whether the petitioners are denied due process of law under the Fifth and Fourteenth Amendments of the United States Constitution and the Tenth and Sixteenth Sections of Article I of the Ohio Constitution by first having to submit to trial, conviction and sentencing

before they are entitled to have their plea bargain agreement enforced which prohibits such trial, judgment and punishment? (*Santobello v. New York*, 404 U.S. 257.)

5. Whether the fact that the respondent, a public prosecutor, has induced the petitioners, the defendants, to plead guilty to one criminal count by false promise to dismiss the remaining criminal counts, *ipso facto*, required dismissal of the remaining criminal counts, when the petitioners cannot be returned to their *status quo ante* due to their "confessions" given as a result of such plea bargain agreement?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *."

Constitution of the United States, Amendment XIV, Section 1:

> "* * * nor shall any state deprive any person of life, liberty or property without due process of law * * *."

Constitution of the State of Ohio, Article I, Section 10:

> "* * * No person shall be compelled, in any criminal case, to be a witness against himself * * *."

Constitution of the State of Ohio, Article I, Section 16:

"All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

STATEMENT OF FACTS

On December 21, 1970, during the September, 1970, term of court, petitioners, Ronnie Woodbury and Thomas Woodbury, and the Honorable Floyd A. Coller, Judge of the Wood County Common Pleas Court, and respondent Daniel T. Spitler, Prosecuting Attorney for Wood County, Ohio, agreed to petitioners receiving immunity from prosecution as to all counts except one count of the multiple criminal indictments then pending against petitioners in the Common Pleas Court of Wood County, Ohio. This was to be accomplished at such time as petitioners entered a plea of guilty to the remaining one count of the indictments, by the motion of respondent, Daniel T. Spitler, to *nolle prosequi* said other counts to which the Honorable Floyd A. Coller agreed to consent and approve.

On January 4, 1971, during the January, 1971, term of court, each of petitioners in consideration of and reliance on the foregoing agreement with the Honorable Floyd A. Coller and respondent Daniel T. Spitler, entered a plea of guilty to one count, were remanded to jail and thereafter cooperated with the Honorable Floyd A. Coller and respondent Daniel T. Spitler, in their investigation and prosecution of other persons suspected of being involved in the same or similar criminal activity, by voluntarily giving sworn statements, submitting to polygraph tests and appearing at court to testify against these other suspects.

On March 4, 1971, during the January, 1971, term of court, the cases involving petitioners were transferred by the Honorable Floyd A. Coller to the Honorable Kenneth H. Adams of the Wood County Common Pleas Court in an effort to abrogate the plea bargain agreement entered into by the parties herein.

On September 27, 1972, during the September, 1972, term of court, the Honorable Kenneth H. Adams, at the request and insistence of the Honorable Floyd A. Coller and respondent Daniel T. Spitler, ordered that the remaining counts of the original indictments against petitioners be set down for immediate trial on October 18, 1972, in violation of the plea bargain agreement. Consequently, petitioners filed their petition for a writ of mandamus in the Court of Appeals for Wood County, Ohio, which now forms the basis for this petition for certiorari. It should be noted that previous thereto on July 20, 1971, and subsequent thereto on February 1, 1973, in violation of the plea bargain agreement, trial dates were also set at the request of Prosecutor Spitler on the same remaining counts. However, these dates were vacated after the petitioners were able to obtain various stays in lower appellate courts.

It should also be noted that James Falls, who was co-defendant in the Wood County Common Pleas Court, along with petitioners herein, is not a party to this petition. The reason for this is that respondent, prior to the filing of the petition for writ of mandamus in the Court of Appeals of Wood County, Ohio, performed his part of the agreement as hereinbefore set forth, granting James Falls immunity by dismissing all counts of the indictment against him except one for which he was placed on probation. Thus the plea bargain agreement which was entered

into by all three defendants has been fulfilled by Prosecutor Spitler in regard to Mr. Falls only.

REASONS FOR GRANTING WRIT

1. The decision below directly conflicts with the due process principles enunciated in this Court's Santobello ruling.

To briefly review the facts, petitioners and respondent agree that a "plea bargain" was reached between them with the approval of the presiding Judge, wherein petitioners were to plead guilty to one criminal count and respondents were to dismiss the remaining counts of the criminal indictments. Petitioners and respondent further agree that petitioners did so plead guilty in reliance upon such promises of the respondent and that the respondent has not dismissed the remaining counts, but instead has insisted that petitioners must stand trial on same.

In *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971), this court set forth the requirement of enforcement of promises of a prosecutor relied upon by a defendant pursuant to a "plea bargain" as follows at 404 U.S. 262:

> "This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, *but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.*" (Emphasis ours.)

Herein, the petitioners not only entered pleas of guilty in reliance upon the promises of the respondent, but they also stripped themselves of any possible defense in any subsequent criminal proceeding by giving the respondent sworn statements, submitting to polygraph tests conducted by respondent and testifying for the respondent.

In regard to the type of relief which a defendant is entitled to upon default of a prosecutor's promise, this court in *Santobello* set forth the alternatives available to a defendant as follows:

> "* * * The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case *require* only that there be *specific performance of the agreement on the plea,* * * * or whether, in the view of the state court, the circumstances *require granting the relief sought by petitioner,* * * *." (Opinion of the court by Mr. Chief Justice Burger, at 404 U.S. 263) (Emphasis ours.)
>
> * * * * * *
>
> "I join the opinion of the Court and *favor a constitutional rule for this as well as for other pending or oncoming cases.* Where the 'plea bargain' is not kept by the prosecutor, the sentence must be vacated and the state court will decide in light of the circumstances of each case whether *Due Process requires (a) that there be specific performance of the plea bargain* or (b) that the defendant be given the option to go to trial on the original charges. One alternative may do justice in one case, and the other in a different case. *In choosing a remedy, however, a court ought to accord a defendant's preference considerable, if not controlling, weight* inasmuch as the fundamental rights

flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State." (Concurring opinion of Mr. Justice Douglas, at 404 U.S. 267) (Emphasis ours.)

* * * * *

"I agree with much of the majority's opinion, but conclude that petitioner must be permitted to withdraw his guilty plea. *This is the relief petitioner requested* and, on the facts set out by the majority, *it is a form of relief to which he is entitled.*

"* * * (w)here the prosecutor has broken the plea agreement, it may be appropriate to permit the defendant to enforce the plea bargain. But that is not the remedy sought here. * * *" (Concurring opinion of Mr. Justice Marshall joined in by Mr. Justice Brennan and Mr. Justice Stewart, at 404 U.S. 267-268) (Emphasis ours.)

Thus, it would appear that a majority of this court believes that in cases similar to *Santobello,* the relief requested by the defendant should generally be granted.

Since the petitioners do not desire to have any plea vacated, the only question should be what further type of relief are the petitioners entitled to, i.e., specific performance of the plea bargain agreement or the relief requested by petitioners. However, this is easily resolved in view of the fact that *the relief sought by the petitioners is specific performance* by the respondent of his promises. Thus the alternatives presented to the petitioner in *Santobello,* are in this case merged into only one course of relief which must be accorded to the petitioners. The denial of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution to the peti-

tioners is consequently the result of the respondent's failure to accord the petitioners the relief to which petitioners are entitled by insisting that the petitioners must either enter into a *new* "plea bargain" or go to trial on the original charges. To require the petitioners to enter into a new "plea bargain" is to ask the petitioners to place their faith, repudiated once already, in the promises of the respondent and flies in the face of the law of *Santobello*. To require the petitioners to go to trial after having entered a plea of guilty is to abrogate the philosophy supporting the provision of the Fifth Amendment of the United States Constitution against double jeopardy as set forth by this court in *Green v. United States*, 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957) as follows at 335 U.S. 187-188:

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. * * *
>
> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty."

As for a judge who has fully participated in plea bargaining with a defendant, acknowledging and confirming promises made by a prosecutor, and before whom that defendant enters a plea of guilty, the requirements of *Santobello* are even more compelling in regard to the

fulfillment of those promises. Nor can these promises or the requirements of *Santobello* be abrogated by the subterfuge of re-assigning the petitioners' cases to another judge who had not participated in the plea bargain since such promises are binding not only upon the individual making them, but also upon the entire office represented by that person. As stated by this court in *Santobello* at 404 U.S. 262:

> "* * * The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That the breach of agreement was inadvertent does not lessen its impact."

The foregoing is equally applicable to judges presiding in the same court.

CONCLUSION

The petition for a writ of certiorari should be granted and the criminal indictments now pending against the petitioners should be dismissed *ipso facto*, since the petitioners cannot be returned to their *status quo ante*.

Respectfully submitted,

M. SHAD HANNA
Attorney for Petitioners

APPENDIX

EXHIBIT A

Decision on Merits of Court of Appeals

(Filed October 16, 1972)

No. 1067

IN THE COURT OF APPEALS
FOR WOOD COUNTY, OHIO

STATE, *ex rel.*, RONNIE WOODBURY
& THOMAS WOODBURN,
Plaintiffs,

vs.

DANIEL T. SPITLER,
Prosecuting Attorney, etc.,
Defendant

JUDGMENT ENTRY

This cause came on to be heard upon the complaint in mandamus and alternative writ to show cause. Plaintiffs present by counsel, M. Shad Hanna; defendant Daniel T. Spitler present in person and in his own behalf.

For want of time no answer having been filed, plaintiffs' motion for judgment for failure to file answer overruled. Defendant given leave to file answer instanter (Sec. 2731.09 R.C.). Oral argument presented by counsel for the parties; evidence adduced.

Finding that the defendant, in open court, affirmed that he would follow the direction of the Supreme Court of Ohio in the case of State, ex rel., Woodbury v. Coller, Judge, No. 72-208 (cited as 31 Ohio St. 2d. 195); and finding that the complaint in mandamus is premature, motion for peremptory writ overruled, motion for new party defendant overruled, and complaint dismissed at plaintiffs-relators' costs.

/s/ JOHN W. POTTER
Presiding Judge

/s/ CLIFFORD F. BROWN
Judge

/s/ FRANK W. WILEY
Judge

EXHIBIT B

Opinion of the Ohio Supreme Court

(Decided May 23, 1973)

No. 72-808

SUPREME COURT OF THE STATE OF OHIO

THE STATE, EX REL., WOODBURY ET AL.,
Appellants,

v.

SPITLER, PROSECUTING ATTORNEY,
Appellee.

APPEAL FROM THE COURT OF APPEALS
FOR WOOD COUNTY.

On October 13, 1972, appellants, Ronnie Woodbury and Thomas Woodbury, sought, in the Court of Appeals, a writ of mandamus compelling appellee, Daniel Spitler, prosecuting attorney of Wood County, to dismiss certain criminal indictments pending against appellants in accordance with a plea-bargaining agreement between appellants and appellee.[1]

The Court of Appeals issued an alternative writ of mandamus, commanding appellee to perform in accordance with the prayer of appellants' complaint, or to show cause why he had not done so at a hearing to be held at 9:15 a. m., on October 16, 1972. Prior to the hearing, appellants filed

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1. Appellants are defendants in multiple count criminal indictments and are presently awaiting trial.

a motion to add new party defendants and to amend their complaint in regard thereto by interlineation.

No answer or other response having been filed or made by appellee prior to commencement of the hearing, appellants moved for a peremptory writ of mandamus. Appellee requested leave to prepare and file his written answer, stating that he was prepared to proceed orally on the merits at that time. The court took all motions and requests under advisement and proceeded with the hearing on the merits.

Upon conclusion of the hearing, the court overruled each of appellants' motions; granted appellee leave to file his answer instanter; and found that the mandamus action was premature in that the appellee affirmed in open court that he would comply with the terms of the plea bargaining agreement at the commencement of the trials. The court dismissed the complaint. Subsequently, the appellee filed his written answer.

The cause is now before this court upon appeal as a matter of right.

STERN, J. It is appellants' contention that if no answer or other pleading is made or filed to an alternative writ of mandamus prior to commencement of the hearing on such writ, a peremptory writ of mandamus must be allowed and issued forthwith against the party to whom the alternative writ was issued. Appellants base this contention on the language of R. C. 2731.10, which provides: "If no answer is made to an alternative writ of mandamus, a peremptory mandamus must be allowed against the defendant."

The crux of this case turns upon the meaning of the word "answer," as used in R. C. 2731.10, and the discre-

tion allowed a court in regard to this matter. Appellants would have us hold that an answer must be made in written form prior to commencement of the hearing, and that the court lacks discretion to allow an unwritten answer. In support of that argument appellants cite the following cases: *State, ex rel. Wiegel, v. Randall* (1953), 160 Ohio St. 327; *State ex rel. Baxter, v. Manchester* (1944), 143 Ohio St. 48; *State, ex rel. Clifton, v. Howard* (1929), 121 Ohio St. 607; *State, ex rel. Clemmer & Johnson Co., v. Turner* (1916), 93 Ohio St. 379; and *State, ex rel. Otenberger, v. Hawes* (1885), 43 Ohio St. 16.

Although the word "answer," as used in regard to pleadings, would normally imply a written answer, we do not feel that a proper reading of those cited cases, or logic, necessitates such a narrow holding in this instance. As indicated by the record herein, the appellee was not served a copy of the alternative writ of mandamus until late on the afternoon of Friday, October 13, 1972, and the hearing was to be held at 9:15 a. m., Monday, October 16, 1972, thereby allowing little time for the preparation and filing of a written answer.

Under such circumstances, in proceeding with the hearing to the extent necessary to determine whether appellants would be prejudiced by not having previously been given a written answer, the court did not abuse its discretion. Nor was it prejudicial error for the court to proceed to a final determination on the merits and permit a subsequent filing of a written answer by appellee.[2]

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2. Appellants do not contend that they were confronted with any new material either by the oral answer or by the subsequent written answer, nor do they contend that they were deprived of the opportunity to adequately prepare an argument contra to appellee's oral answer.

Indeed, the crux of the answer presented by appellee at the hearing was an affidavit signed by the appellee in which he acknowledged that proper plea bargaining had occurred, and stated that he would comply with all the provisions of the plea-bargaining agreement and that he "* * * is prepared to proceed with prosecution * * * and will not use as evidence against the defendant[s] any statements or admissions or evidence resulting from such statements or admissions given by the defendant[s] to the prosecution as a result of plea bargaining."

That assurance by appellee was previously made before this court in the case of *State, ex rel. Woodbury, v. Coller* (1972), 31 Ohio St. 2d 195, which involved issues substantially the same as those presented herein. As stated therein, at page 196: "Prohibition will not lie as to a prosecutor who is duty bound to proceed to prosecute pursuant to indictment. *The prosecuting attorney will be required to carry out any proper agreements entered into with defense counsel* which were relied upon by appellants to their prejudice. The prosecuting attorney, in oral argument before this court, asserted his intention to carry out completely such agreements." (Emphasis added.)

In view of the foregoing, we agree with the Court of Appeals that this writ was improvidently sought. Extraordinary remedies, *i. e.*, mandamus, prohibition and habeas corpus, are available only when usual forms of procedure are incapable of affording relief. They may not be employed before trial on the merits, as a substitute for an appeal for the purpose of reviewing mere errors, or irregularities in the proceedings of a court having proper jurisdiction, or as a means for testing the constitutionality of a statute in favor of one who has been convicted or who has charges pending against him where the court wherein

the criminal cause is pending or conviction was obtained had jurisdiction to determine the question of constitutionality.[3]

This writ of mandamus, having been sought on the basis of anticipation of an omission of duty, was properly denied, and the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, *C.J.*, HERBERT, CORRIGAN, CELEBREZZE, W. BROWN and P. BROWN, *JJ.*, concur.

HERBERT, *J.*, concurring. I concur, but believe that we could have reached the same result without citing R. C. 2731.10. That statute should not be construed as controlling the exercise of original jurisdiction in mandamus constitutionally granted to Courts of Appeals and this court.

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3. See 63 American Jurisprudence 2d 260, Prohibition, Section 31; 52 American Jurisprudence 2d 333 and 334, Mandamus, Sections 4 and 5; 39 American Jurisprudence 2d 186, Habeas Corpus, Section 12.

EXHIBIT C

Decision on Merits of Ohio Supreme Court

(Filed June 20, 1973)

No. 72-808

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *ex rel.*
RONNIE WOODBURY *et al.*,
Appellants,

vs.

DANIEL T. SPITLER,
Prosecuting Attorney,
Appellee.

APPEAL FROM THE COURT OF APPEALS
FOR WOOD COUNTY

This cause, here on appeal from the Court of Appeals for Wood County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Court of Appeals to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Wood County for entry.

THOMAS L. STARTZMAN
Clerk

EXHIBIT D

Decision on Rehearing of Ohio Supreme Court

(Filed June 20, 1973)

No. 72-808

THE SUPREME COURT OF THE STATE OF OHIO

STATE OF OHIO, *ex rel.*
RONNIE WOODBURY *et al.*,
Appellants,

vs.

DANIEL T. SPITLER,
Prosecuting Attorney, Wood County,
Appellee.

REHEARING

It is ordered by the court that rehearing in this case is denied.

EXHIBIT E

Mandate of Ohio Supreme Court

(Filed June 20, 1973)

No. 72-808

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *ex rel.*
RONNIE WOODBURY, *et al.*,
Appellants,

vs.

DANIEL T. SPITLER,
Prosecuting Attorney,
Appellee.

MANDATE

To the Honorable Court of Appeals Within and for the County of Wood, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.